STATE OF MICHIGAN

IN THE SUPREME COURT

OK

MARK TODD TWICHEL, Personal Representative
of the Estate of BRADY S. SIES, Deceased,

Plaintiff-Appellee,

Opn 5/31/02

Court of Appeals Docket No: 228363
Lower Court Case No: 99-65692-NI

-vs-

Grksee
A. Hayman

MIC GENERAL INSURANCE CORPORATION,

Defendant-Appellant.

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APPLICATION FOR LEAVE TO APPEAL
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STATEMENT REGARDING JURISDICTION

Pursuant to MCR 7.301(A)(2), this Court has jurisdiction over Defendant/Appellant's Application for Leave to Appeal from a Court of Appeals Decision. Defendant/Appellant has filed this Application within the 21 day deadline under MCR 7.302(C)(2).

STATEMENT OF QUESTION INVOLVED

1. **IS THE ESTATE BARRED FROM RECOVERY OF MICHIGAN PIP BENEFITS FROM MIC GENERAL, WHERE THE DECEDENT WAS THE OWNER AND OPERATOR OF AN UNINSURED MOTOR VEHICLE THAT WAS INVOLVED IN THE ACCIDENT?**

Defendant/Appellant answers this question "YES."

Plaintiff/Appellee answer this question "NO."

The Trial Court answered this question "NO."

The Court of Appeals answered this question "NO."

2. **IS THE ESTATE BARRED FROM RECOVERY OF UNINSURED MOTORIST BENEFITS FROM MIC GENERAL, WHERE THE DECEDENT WAS AN OWNER OF THE MOTOR VEHICLE THAT WAS INVOLVED IN THE ACCIDENT, AND THAT MOTOR VEHICLE WAS NOT LISTED IN THE MIC GENERAL POLICY?**

Defendant/Appellant answers this question "YES."

Plaintiff/Appellee answer this question "NO."

The Trial Court answered this question "NO."

The Court of Appeals answered this question "NO."

STATEMENT IN SUPPORT OF APPLICATION FOR LEAVE TO APPEAL

Pursuant to the public policy of this state, owners and registrants of motor vehicles registered in this state are required to insure their vehicles, including no fault insurance. M.C.L.A. §500.3101(1). Zamani v. Auto Club Ins. Ass'n, 124 Mich.App. 29, 34, 333 N.W.2d 373 (1983). In order to help effectuate this policy, the no-fault act denies recovery of no-fault benefits where the driver is uninsured. M.C.L.A. §500.3113; Zamani, supra.

In the instant case, the Court of Appeals held that the estate of Brady Sies was entitled to recover no fault benefits, even though it is undisputed that he died of injuries sustained while driving an uninsured vehicle which he had exclusive use of, and which he was purchasing by way of multiple payments over time from another individual. Defendant/Appellant MIC General denied the claim for benefits on the basis of M.C.L.A. §500.3113, asserting that Mr. Sies owned the vehicle within the meaning of MCLA §500.3101(2)(g)(i) and (iii). Specifically, this Defendant maintains that (1) Mr. Sies had the right to use the subject vehicle for a period greater than 30 days, and he was therefore an owner of the vehicle within the meaning of MCLA §500.3101(2)(g)(i), and (2) that he had the immediate right of possession of the motor vehicle under an installment sale contract, and he was therefore an owner of the vehicle within the meaning of MCLA §500.3101(2)(g)(iii). With regard to MCLA §500.3101(2)(g)(iii)(which defines an "owner" as a person who has the immediate right of possession of a motor vehicle under an installment sale contract), the Court of Appeals held that this definition of "owner" only applies to written retail sales transactions. The unfortunate end result is that the Court of Appeals has created a huge loophole for individuals to contravene the purposes of the No Fault Act. Under the Court's analysis, an individual can purchase a motor vehicle with periodic

payments, neglect to purchase insurance for the vehicle, and yet ensure his/her right to recover no fault benefits for injuries sustained while driving the vehicle. This can all be accomplished by either purchasing the vehicle from someone (such as a family member, friend, or someone selling through an ad) who is not in the retail sales business, or by not reducing the sale to writing. It is impossible to conceive why the No Fault definition of "owner" should be restricted in this fashion. Whatever definition is accepted should be consistent with the goals and policies behind the Act. Obviously, the analysis adopted by the Court of Appeals deals a serious blow to the public policy that owners and registrants of motor vehicles registered in this state must insure their vehicles, including no fault insurance.

Unfortunately, apart from the decision rendered in this case, no reported Michigan appellate decision has explicitly discussed (1) whether a right to use (as opposed to actual use) the vehicle for a period greater than 30 days is sufficient under MCLA §500.3101(2)(g)(i), and (2) whether or not MCLA §500.3101(2)(g)(iii) is restricted to written retail installment sales agreements. Given the strong public of this state requiring motor vehicles to be covered by insurance, this Defendant/Appellant submits that the citizens, bench and bar of this state would greatly benefit from this Court's review of these issues.

This appeal also raises the issue whether or not the Plaintiff is entitled to recover underinsured motorist benefits under Defendant's policy. The underinsured motorist coverage portion of Defendant's policy has an exclusion for bodily injury sustained by "an 'insured' while 'occupying' or when struck by, any motor vehicle owned by that 'insured' which is not insured for this coverage under this policy." This Defendant submits that the Mr. Sies was the "owner" of the subject vehicle within the plain, ordinary and popular sense of that term. Accordingly,

Defendant submits that the Plaintiff Estate is not entitled to recover underinsured motorist benefits. Because this issue is so closely related to the issues discussed above, and has not yet been the subject of review by this Court, the citizens, bench and bar of this state would greatly benefit from this Court's review of this issue as well.

STATEMENT REGARDING ORDERS APPEALED FROM

This is a declaratory judgment action, in which the Plaintiff Estate sought a ruling that it was entitled to (1) Michigan no-fault insurance benefits, and (2) uninsured motorist benefits. The claim arises out of a November 17 1998 motor vehicle accident in which the Plaintiff's decedent, Brady Sies, was killed. The vehicle which he was driving was uninsured. The estate seeks benefits under a policy of insurance issued by MIC General to Elmer Sies, grandfather of Brady Sies.

Defendant/Appellant MIC General denied the claim for benefits on the basis of M.C.L.A. §500.3113, asserting that Mr. Sies owned the vehicle he was driving, within the meaning of MCLA §500.3101(2)(g)(i) and (iii).

In the trial court, the parties filed cross-motions for summary disposition. The trial court ruled that (1) there was no showing that Brady Sies had exclusive use the vehicle for a period greater than 30 days, and (2) there was no showing that Mr. Sies had entered into an installment sales contract. (Transcript of the June 5, 2000 proceedings at p. 15). The lower court granted Plaintiff's Motion for Summary Disposition, and denied Defendant's motion. (Transcript of the June 5, 2000 proceedings, at pp. 15-16). The formal Order of Summary Disposition was entered on June 20, 2000. (Exhibit 8).

Defendant MIC General filed a timely Claim of Appeal on July 5, 2000. On May 31, 2002, the Court of Appeals issued an opinion affirming the Order of Summary Disposition in favor of the Plaintiff. (Exhibit 9).

Defendant/Appellant MIC General now seeks leave to appeal to this Court from the lower court order of summary disposition, and the May 31, 2002 opinion of the Court of Appeals.

STATEMENT OF FACTS AND PROCEEDINGS

A. Introduction

This is a declaratory judgment action, in which the Plaintiff sought a ruling that it was entitled to (1) Michigan no-fault insurance benefits, and (2) uninsured motorist benefits. The claim arises out of a November 17 1998 motor vehicle accident in which the Plaintiff's decedent, Brady Sies, was killed. These benefits are sought under a policy of insurance issued by MIC General to Elmer Sies, grandfather of Brady Sies.

In the lower court, both the Plaintiff and the Defendant moved for summary disposition. The lower court granted the Plaintiff's motion, and ruled that the MIC General policy covered the Plaintiff for no-fault and uninsured motorist benefits for the accident of November 17, 1998.

As will be more fully discussed below, the central issue on this appeal is whether or not Brady Sies was an owner of the uninsured vehicle that he was driving at the time of the accident. There is no dispute that the Plaintiff is not entitled to no-fault or uninsured motorist benefits if Mr. Sies was an owner of the vehicle. As in the lower court, it is the position of Appellant, MIC General, that Brady Sies was an owner of the subject vehicle because:

(1) Within the meaning of MCLA §§ 257.37(a) and 500.3101(2)(g), he had the right to exclusive possession of the vehicle for a period greater than 30 days; and

(2) Within the meaning of MCLA §§ 257.37(c) and 500.3101(2)(g)(iii), he had the immediate right of possession of the subject vehicle under an installment sales contract; and

(3) Mr. Sies was an owner of the vehicle in the plain and ordinary sense, because he had possession and control of the vehicle from the date of purchase through the date of the accident.

B. Chronology of Underlying Facts

On November 17, 1998, Brady Sies was killed as a result of injuries received in a motor vehicle accident on Jennings Road in Mt. Morris Township, Michigan. The case at bar is a lawsuit by his Estate against the Defendant MIC General for recovery of Michigan PIP benefits and uninsured motorist benefits against a policy issued by MIC General to Elmer Sies, Brady Sies's grandfather. MIC General has denied the claim for Michigan PIP benefits because the plaintiff was, as a matter of law, an owner of the uninsured pick up truck he was operating at the time of the accident. MIC General has denied the uninsured motorist claim by the Estate on the basis that the claim is excluded in that Brady Sies was an owner of the pick up truck he was operating at the time of the accident, which pick up truck was not a vehicle insured on the MIC General policy.

The MIC General policy, #0227946A02, as issued to Elmer Sies, effective May 30, 1998, is Ex.#1, and the denial letter issued to the Estate dated June 9, 1999, is attached hereto as Ex.#2.

The police report for the accident of November 17, 1998, is attached hereto as Ex.#3. It confirms that, at the time of the fatal accident, Brady Sies was operating a 1988 GMC pickup truck, vehicle identification number 1GTBS14E9J2519312 (hereinafter "1988 pick up").

Information regarding Brady Sies and the pick up truck involved in the accident was developed in a series of depositions taken in this case marked as exhibits as follows:

Ex. A - Matthew Roach (decedent's friend)

Ex. B - Betty Sies (grandmother)

Ex. C - Roseanne Sies (step-mom)

Ex. D - Calvin Sies (father)

Ex. E - Emily Slater (girlfriend).

Reference hereinafter to their testimony will be the exhibit letter of their transcript, followed by the page number in parenthesis.

MATTHEW ROACH

The facts addressed in the deposition of Matthew Roach were initially established in his Affidavit dated October 4, 1999 (Ex. 4). That Affidavit stated as follows:

"1. I was the owner of a 1988 GMC Pick-up Truck, VIN # 1GTBS14E9J2519312. I purchased that vehicle in 1991. No other person or entity was named on the title.

2. The above vehicle was sold to Mr. Brady Sies on or about November 12, 1998. The selling price was $600.00. I received an initial payment of $300.00 with the balance to be paid at a later date.

3. Mr. Sies took possession of the vehicle on or about November 12, 1998. I provided all of the keys to the vehicle to him on that date. I did not sign the title on the date that Mr. Sies took possession, as he had not fully paid for the vehicle.

4. I called my agent at Action Insurance on Court Street in Flint, Michigan and transferred the insurance from the truck to my new vehicle, a Malibu, on November 1, 1998. The truck was not driven after that date.

5. I received a notice confirming the cancellation from the Titan Insurance Company and have that in my possession.

6. At no time following the sale of the vehicle on November 12 did I have access to or operate the vehicle sold to Mr. Sies.

7. I left the license plate on the vehicle so that Brady Sies would be able to drive the vehicle to the Secretary of State to obtain new plates.

8. After the funeral on or about November 25, 1998, Mr. Sies' step-mother, Rose Sies, paid me $200.00 for the vehicle and I accepted that as payment in full."

Roach and Brady Sies were friends (A5-6). Roach "sold" the pick up truck to Brady Sies on November 12, 1998, five days before the motor vehicle accident for $600 (A8-9). He received $300 of the $600 purchase price from Brady Sies and gave Brady Sies possession of the pick-up truck (A8-9). Roach did not give Brady Sies the title to the pick-up truck (A9). He did not intend to give Brady Sies the title to the pick-up truck for the Secretary of State until he received the remainder of the purchase price from Brady Sies (A9).

Prior to this transaction Brady Sies had been driving a new S10 Ford pick-up truck (hereinafter "new pick up truck"), but could not afford the payments on same (A9). The decedent advised Roach that he intended to transfer the plates from the new pick-up truck to the pick-up truck that Roach was selling him (A9). Roach left his own license plate on the pick-up truck so that Brady Sies would be able to drive it to the Secretary of State and take care of transferring the plates (A9).

Roach also advised Brady Sies that the pick-up truck was uninsured and that it was his responsibility to get insurance on the pick-up truck right away (A13).

The $300 balance on the purchase of the pick-up truck was never paid to Roach before the accident (A10). After the accident, Brady Sies's mother Rose Sies gave Roach $200 which he accepted as full payment on the balance for the pick-up truck (A10). There never was any written contract between Roach and Brady Sies regarding the purchase of the vehicle (A15).

BETTY SIES

Betty Sies is the grandmother of Brady Sies (B7) and wife of Elmer Sies. According to her, Brady Sies had been living with her and his grandfather Elmer Sies at the time of his death (B7). Some months before his death, Brady Sies had leased a new pick-up truck in his grandfather's name

(B10-11). The new pick-up truck was listed on the policy issued by MIC General to Elmer Sies (Ex.#1). The decedent was the one actually funding both the lease payments and insurance premiums for the new pick-up truck which was the arrangement he had with his grandparents (B11).

Previously, Brady Sies had complained to his grandmother about how expensive his auto insurance premiums were (B13). When the new pick-up truck was leased they knew it would be "a lot cheaper" to put the vehicle on Elmer's policy than putting it in Brady Sies's name (B15). They did not notify MIC General that their grandson, Brady Sies, had moved in with them and that he was the primary driver of the new pick up truck (B15).

The reason why Brady Sies's insurance premiums were so expense is simply that he had a very poor driving record, see attached Ex.#5.

A week or two before his death, Brady Sies began driving an older model red pick-up that used to belong to his friend Matt Roach (B17-18). The decedent was the only known driver of the 1988 pick-up truck (B18).

ROSE SIES

The decedent's stepmother was Rose Sies (C6). About a week or two before his accident, Brady Sies obtained an older model red S10 pickup truck, i.e., the 1988 pickup, from his friend Matt Roach (C22). As far as she knew, Brady Sies was the only one to drive the 1988 pick-up truck (C25). The decedent was well aware of the cost of car insurance. In 1997, he owned a Suzuki Jeep and "bitched about" the high cost of the premiums on it (C19), undoubtedly made significantly worse by his poor driving record.

CALVIN SIES

Calvin Sies is the father of Brady Sies (D5). Shortly before the accident, Brady Sies appeared at Calvin's home driving an older model red pick-up truck (D14). He joined Brady Sies in a driver to Discount Tire to get a tire fixed (D14). The decedent informed Calvin that he had bought the 1988 pick-up truck because he was putting too many miles on the new pick-up truck (D15). He never observed anyone other than Brady Sies operating the 1988 pick-up truck (D18).

EMILY SIES

Emily Slater was the girlfriend of Brady Sies at the time of his death (E16). She confirmed that shortly before his death, Brady Sies obtained a red older model S10 pick-up truck, i.e., 1988 pick-up, which he used for his transportation needs (E19-20). No one else drove that vehicle once Brady Sies obtained possession of same (E21).

OTHER MATTERS

In 1997, Brady Sies was charged with kidnaping, criminal sexual conduct in the second degree, and assault with a deadly weapon, see Ex.#6. As a result of these charges, Brady Sies pled guilty to felonious assault, see Plaintiff's Answers to Defendant's Interrogatories, #5. The decedent was still wearing a tether at the time of the accident as part of his criminal punishment. As a condition of his release, he was to refrain from all use of alcohol. His blood alcohol at the time of the accident was .07, see Ex.#7.

Following Brady Sies's death, claims were presented by his estate for payment of Michigan PIP benefits and UM benefits on the policy issued to his grandfather, Elmer Sies. The claim was denied by MIC General by letter dated June 9, 1999, Ex.#2.

C. Lower Court Proceedings

After the close of discovery, the parties filed cross-motions for summary disposition. The lower court heard oral argument on these motions on June 5, 2000. At that time, the lower court ruled that (1) there was no showing that Brady Sies had exclusive use the vehicle for a period greater than 30 days, and (2) there was no showing that Mr. Sies had entered into an installment sales contract. (Transcript of the June 5, 2000 proceedings at p. 15). The lower court granted Plaintiff's Motion for Summary Disposition. (Transcript of the June 5, 2000 proceedings, at pp. 15-16). The formal Order of Summary Disposition was entered on June 20, 2000. (Exhibit 8).

D. Proceedings in the Court of Appeals

Defendant MIC General filed a timely Claim of Appeal on July 5, 2000. On May 31, 2002, the Court of Appeals issued an opinion affirming the Order of Summary Disposition in favor of the Plaintiff. (Exhibit 9).

Defendant/Appellant MIC General now seeks leave to appeal to this Court from the May 31, 2002 opinion of the Court of Appeals.

ARGUMENT I

THE ESTATE IS BARRED FROM RECOVERY OF MICHIGAN PIP BENEFITS FROM MIC GENERAL BECAUSE THE DECEDENT WAS THE OWNER OF AN UNINSURED MOTOR VEHICLE THAT WAS INVOLVED IN THE ACCIDENT.

(A) Standard of Review

Defendant/Appellant appeals from an order denying Defendant's Motion for Summary Disposition, and granting Plaintiff's Motion for Summary Disposition. An order granting or denying summary disposition must be reviewed de novo by the appellate courts. Steele v Michigan Dept. of Corrections, 215 Mich App 710, 712, 546 NW2d 725 (1996); Barr v Mt. Brighton, Inc., 215 Mich App 512, 515, 546 NW2d 273 (1996).

(B) Analysis

The plaintiff estate claims benefits under the Michigan No-Fault Law, MCLA 500.3101, et. seq. Section 3113 of that law indicates those circumstances when an injured person is barred from recovery stating:

> "A person is not entitled to be paid personal protection insurance benefits for accidental bodily injury if at the time of the accident any of the following circumstances existed:
>
> . . .
>
> (b) The person was the owner or registrant of a motor vehicle or motorcycle involved in the accident with respect to which the security required by Section 3101... was not in effect."

The owner of an uninsured motor vehicle is barred from recovery of Michigan PIP benefits if that uninsured motor vehicle is involved in the accident, Heard v State Farm, 414 Mich 139, 324 NW2d 1 (1982).

MCLA 500.3101 is the definition section of the No-Fault provides:

"The owner... of a motor vehicle required to be registered in this state shall maintain security for payment of benefits under personal protection insurance, property protection insurance, and residual liability insurance...".

"Owner" is defined in the Michigan No-Fault Law in MCLA 500.3101(2)(g) as follows:

"'Owner' means any of the following:

. . .

(i) A person renting a motor vehicle or having the use thereof, under a lease or otherwise, for a period that is greater than 30 days.

. . .

(ii) A person who holds the legal title to a vehicle...

(iii) A person who has the immediate right of possession of a motor vehicle under an installment sale contract."

Owners of motor vehicles are required to maintain no-fault insurance coverage on motor vehicles that they operate on the public roads of the State of Michigan.

The word "owner" is also used in the Michigan Motor Vehicle Code, MCLA 257.1, et. seq., for such purposes as the Michigan Owners Liability Statute, MCLA 257.401. "Owner" is also defined in the Motor Vehicle Code in MCLA 257.37 as follows:

(a) Any person, firm, association, or corporation renting a motor vehicle or having the exclusive use thereof, under a lease or otherwise, for a period that is greater than 30 days.

(b) Except as otherwise provided in section 401a, a person who holds the legal title of a vehicle.

(c) A person who has the immediate right of possession of a vehicle under an installment sale contract.

The definition of owner as used in the No-Fault Law and the Motor Vehicle Code are virtually identical for purposes of the first and third definitions (except that MCLA 500.3101(2)(g) does not use the word "exclusive" in its first definition). The Court of Appeals has recognized that

the Motor Vehicle Code definition of "owner" is to be read in pari materia with the No-Fault Act. State Farm v Sentry, 91 Mich App 109, 283 NW2d 661 (1979).

There is no dispute that Matthew Roach was the titled owner of the pick-up truck involved in the accident, and that Brady Sies was not the titled owner of the pick-up truck on the date of the accident. This fact is not dispositive, however. Under Michigan law, there can be more than one owner of a motor vehicle based upon the above noted definition. Given the definition of the term "owner," under Michigan law, Brady Sies was an owner of the motor vehicle for either, or both, of the following reasons:

1. He had a "right to exclusive use" for a period exceeding thirty days (even though he had not possessed the pick-up truck for more than thirty days at the time of the accident) pursuant to Section 3101(2)(g)(i), and MCLA 257.37(a), and;

2. He had the immediate right of possession of the pick-up truck he was driving at the time of the accident under an installment sale contract, pursuant to Section 3101(2)(g)(iii), and MCLA 257.37(c).

(1) The decedent was an owner because he had the "right to exclusive use" of the pick-up truck involved in the accident for a period exceeding thirty days.

The definition of "owner" in Section 3101(g)(i) of the Michigan No-Fault Law is identical to the definition of "owner" in the Motor Vehicle Code, MCLA 257.37, to the extent that it applies to any person "having the use" of a motor vehicle "for a period that is greater than 30 days". This definition was addressed in Ringewold v Bos, 200 Mich App 131, 503 NW2d 716 (1993). In that case, the plaintiff was injured in an automobile accident and sought to sue the defendant as owner. The automobile was titled in the name of the defendant's ex-husband who had given her possession of the automobile just 15 days before the accident occurred. The defendant argued that she could

not be deemed an owner of the motor vehicle pursuant to the Motor Vehicle Code because she did not have use of the motor vehicle "for a period that is greater than 30 days".

The Court of Appeals first commented stating:

> "This Court has stated that the word "owner" is not meant to restrict liability to a person or entity whose title is good against all others, and under the code there may be several owners. [Citations omitted]. Moreover, this Court has specifically held that a person need not hold legal title to an automobile in order to be an "owner" of it under the code. [Citations omitted]." Ringewold, supra, at 135 (emphasis added).

The Court of Appeals then stated its analysis as follows:

> "We disagree with defendant's contention that person must have actually used the vehicle for a thirty-day period before a finding of ownership may be made under this section. The primary goal of statutory construction is to ascertain and give effect to the Legislature's intent. [Citations omitted]. We first look to the language of the statute with the presumption that the Legislature intended the meaning plainly expressed.. . .The language of the statute should be interpreted keeping in mind the statutes' purpose and the objective sought to be accomplished. . .Our Supreme Court has given the "exclusive use" language of this section a broad interpretation. [Citations omitted]
>
> With these rules of statutory construction in mind, we conclude that the Legislature did not intend to restrict the definition of "owner" under this section to those who have actually exercised exclusive control over a vehicle for a thirty-day period. Rather, in view of the Legislature's intention to place liability on the person who is ultimately in control of the vehicle under the owner's liability section, we believe that the statute imposes liability on any person who has a "right to exclusive use" for a period exceeding thirty days, regardless of whether that person has, in fact, controlled the vehicle for that period. . . .To conclude otherwise would be to give owners incentive to delay formalization of title and deny ownership in an effort to avoid liability under the statute. We agree with the trial court's statement that the provision is intended to preclude a finding of ownership where a person's right to exclusive use of the vehicle will not exceed thirty days, but not in cases where ownership has been transferred permanently." Ringewold, supra, at 137-138 (emphasis added).

The Court of Appeals noted in Ringewold that the purpose of the Owner's Liability Statute is "to place the risk of damage or injury upon the person who has ultimate control of a vehicle",

Ringewold, supra, at 134. So also, it is inherent in the provisions of the Michigan No-Fault Law that the ultimate responsibility to purchase no-fault insurance be placed "upon the person who has ultimate control of a vehicle". In this case, the person with control of the vehicle was Brady Sies, after he received possession of it. Clearly, he knew that the vehicle was uninsured based upon what he had been advised by Matthew Roach, but for whatever reason, had not bothered to purchase insurance for the pick-up truck before the accident. If he does not purchase insurance on the pick-up truck, who will? Within the meaning of the Michigan No Fault Act, Brady Sies was an owner of the pick-up truck involved in the accident, because he had the "right to exclusive use" of the pick-up truck for a period exceeding thirty days.

Nonetheless, despite the reasoning and result adopted in the Ringewold case, the Court of Appeals in the instant case held that the right to use a motor vehicle for a period that is greater than 30 days is not sufficient to make someone an owner under MCLA §500.3101(2)(g)(i). The Court rejected Defendant's argument that the definitions of "owner" in Michigan's No Fault Act and the Motor Vehicle Code must be read in pari materia, held that the No Fault Act and the Owner's Liability Statute have different purposes, and therefore refused to apply the reasoning of Ringewold to the facts of this case. The Court's reasoning in this regard is clearly erroneous. In the first place, the Court erred by drawing a narrow comparison between the purposes of the Owner's Liability Statute and the No Fault Act. In particular, the Court failed to recognize that the definition of the term "owner" in MCLA §257.37 was not intended to apply solely to the Owner's Liability Act, but also to the Motor Vehicle Code as a whole, including the Financial Responsibility Act (MCLA §§257.501, et seq.). The purposes and operation of Michigan's No Fault Act, the Owner's Liability Statute and the Financial Responsibility Act are inextricably intertwined, with nearly identical

definitions of the term "owner." The Owner's Liability Statute and the No Fault Act both address the scope and conditions of liability related to the ownership, operation and use of motor vehicles. Likewise, the Financial Responsibility Act and the No Fault Act share the common purpose of ensuring that a financially responsible source of recovery will be available for victims of motor vehicle accidents. Moreover, it is beyond dispute that one of the principal changes made by the No Fault Act is the modification of an owner's active and vicarious liability for negligence in driving an automobile. In short, these statutes share a common purpose, and were designed to work together. They can hardly serve this function, however, if the term "owner" means one thing in the Owner's Liability Statute and Financial Responsibility Act, and something else in the No Fault Act.

Contrary to what the Court of Appeals concluded in the instant case, the Owner's Liability Statute, Financial Responsibility Act and No Fault Act share a common purpose, and must be read in pari materia for purposes of the definition of the term "owner." For the reasons discussed above, the proper definition for all three statutes is the one adopted by the Court of Appeals in Ringwold.

(2) In the alternative, Brady Sies was the owner of the pick-up truck involved in the accident because he purchased it pursuant to an installment sales contract with immediate right of possession.

As noted above, the other definition of owner contained in both the Michigan No-Fault Law and the Motor Vehicle Code applies to "a person who has the immediate right of possession of a vehicle under an installment sale contract".

The Michigan No-Fault Law does not define the word "installment" or the phrase "installment sale contract". Where a term is not defined in a statute, it must be given its plain and

ordinary meaning, i.e., its general dictionary definition. MCLA 8.3a; State Defender v Legal Aid, 230 Mich App 426, 584 NW2d 359 (1998); Michigan Mutual v CNA Insurance, 181 Mich App 376, 448 NW2d 854 (1989).

"Installment" is defined in the *Merriam Webster's Collegiate Dictionary, Tenth Edition*, pg.606, as "One of the parts into which a debt is divided when payment is made at intervals." In other words, where a debt is not to be paid all at once, but is divided into payments to be made over time, those payments are installments. In deciding whether or not Defendant MIC General was entitled to summary disposition on this issue, this Court must keep in mind that Defendant's motion was submitted under MCR 2.116(C)(10). This type of motion tests whether there is factual support for the Plaintiff's claim. Skinner v. Square D Company, 445 Mich 153, 161, 516 NW2d 475 (1994). The party opposing such a motion has the burden of showing that a genuine issue of fact exists. Werth v. Taylor, 190 Mich App 141, 145, 175 NW2d 426 (1991). Additionally, the non-moving party must satisfy this burden by producing admissible evidence. Zimmerman v. Stahlin, 374 Mich 93, 97, 130 NW2d 915 (1964); Meagher v. Wayne State University, 222 Mich App 700, 719, 565 NW2d 401 (1997); S.S.C. v. Detroit Retirement System, 192 Mich App 360, 364, 480 NW2d 275 (1991). Conjectures, conclusions, mere allegations and inadmissible hearsay are not sufficient to create a question of fact for the jury. LaMothe v. Auto Club Insurance Association, 214 Mich App 577, 586, 543 NW2d 42 (1995); Cloverleaf Car Company v. Phillips Petroleum Company, 213 Mich App 186, 192-193, 540 NW2d 297 (1995); S.S.C. v. Detroit Retirement System, 192 Mich App 360, 364, 480 NW2d 275 (1991). A merely unsubstantiated promise to produce evidentiary support at trial is also insufficient to defeat a motion under MCR 2.116(C)(10). McCart v. Thompson, Inc., 437 Mich 109, 115-116, 469 NW2d 284 (1991).

Furthermore, the non-moving party cannot defeat this type of motion by merely asserting that the jury might disbelieve the moving party's evidence, and believe the non-moving party's unsupported claims. Frank v D'Ambrosi, 4 F3d 1378, 1384 (6th Cir, 1993); Wixson v Dowagiac Nursing Home, 866 F. Supp. 1047, 1056 (W.D. Mich, 1994); Heath v Highland Park School District, 800 F Supp 1470 (E.D. Mich, 1992).

When judged by this standard, there is no question that Defendant MIC General was entitled to summary disposition in its favor. Defendant MIC General produced abundant evidence that Mr. Sies had indeed entered into an installment sales contract. The Plaintiff Estate, on the other hand, failed to satisfy its burden of coming forth with evidence that Brady Sies had not entered into such a contract.

In the case at bar, since Brady Sies did not pay the debt all at once, his subsequent payment or payments would be installments. Although the lower court held that Brady Sies did not enter into an installment sales contract, this ruling flies in the fact of the undisputed evidence in this case. Both by affidavit and by deposition, Matthew Roach attested to the fact that he sold the subject vehicle to Brandy Sies for $600.00, and that he received an initial payment of $300.00 with the balance to be paid at a later date. (Ex. 4, ¶2; Ex. A, pp. 8-10). By definition this was an installment sales contract, because Mr. Sies' debt was divided into payment to be made over time. The transaction certainly meets the basic requirements of a sales contract in that it was an agreement for purchase of property for consideration.

Finally, since Brady Sies was given the vehicle at the time he made the down payment, he had the immediate right of possession. Therefore, the sale of the pick-up truck to Brady Sies under

this arrangement was an installment sale contract. Therefore, he would qualify as an owner under MCLA §§ 257.37 and 500.3101(2)(g).

In the lower court, the Plaintiff argued that the definition of installment sales contract contained in MCLA 492.102, should be controlling in the case at bar. The Court of Appeals erroneously accepted this argument. MCLA 492.101, et. seq., is the Motor Vehicle Sales Finance Act (hereafter referred to as the "MVSFA"). As indicated in its preamble, it is intended to apply to persons engaged in the business of financing sales of motor vehicles. (See also MCLA 492.103.) Moreover, this statute defines "Installment seller" as a person "engaged in the business of selling, offering for sale, hiring, or leasing motor vehicles. . ." MCLA § 492.102 (4). The statute was not intended to apply to a private individual involved in a single transaction for the sale of his private motor vehicle. For example, a person finding a purchaser of their motor vehicle through a want ad, and selling said motor vehicle to another individual in installments would not be bound by the MVSFA.

In order for this Court to determine whether or not the definition of installment sales contact in the MVSFA is to be used to define the term "installment sales contract" in the No-Fault Law, this Court must determine whether or not the statutes are in pari materia.

> "Statutes are in pari materia when they relate to the same person or thing, to the same class of persons or things, or have the same purpose of object."
> Richardson v Jackson, 432 Mich 377, 384, 407 NW2d 74 (1989).

In Jackson, this Court determined that two statutes were not in pari materia because the objective of the two statutes were substantially different even though they both involved the operation of recreation facilities. See also Radecki v Worker Comp. Director, 208 Mich App 19, 526 NW2d 611 (1994).

The purpose of the Michigan No-Fault Law is to provide individuals injured in motor vehicle accidents assured, adequate and prompt reparation for certain economic losses, Babbitt v Employers Insurance, 136 Mich App 198, 355 NW2d 635 (1984). The No-Fault Act does not purport to compensate accident victims for all economic losses. Liberty Mutual v Allied Truck, 103 Mich App 33, 302 NW2d 588 (1981). On the other hand, the purpose of the MVSFA is to regulate and license persons engaged "in the business of making or financing" motor vehicle sales, see pg. 490 of the MCLA volume containing MCLA 492.101, et. seq. Just as in the Richardson case, the two statutes in the case at bar, i.e., the MVSFA and the No-Fault Act have substantially different purposes and, therefore, the definition used in one as limited to "retail" sales should not be used to define or interpret the phrase "installment sales contract" contained in the Michigan No-Fault Law.

If the legislature had intended to limit the application of the definition contained in the No-Fault Statute to retail circumstances, it would simply have prefaced the phrase "installment sales contract" with the word "retail". There is not the slightest evidence that these two statutes share a common purpose. The MVSFA does not even remotely address the scope and conditions of liability related to the ownership, operation and use of motor vehicles. Moreover, the statute does not in any fashion ensure that a financially responsible source of recovery will be available for victims of motor vehicle accidents. Quite simply, the MVSFA and the No Fault Act should not be read in pari materia. Surprisingly, the Court of Appeals read these two statutes in pari materia without ever concluding that they had they same purposes. Instead, the Court merely concluded that the Legislature "presumably was aware" of the provisions of the MVSFA when it adopted the no fault definition of the term owner. This is surely a weak basis for importing retail sales concepts into the no fault definition of "owner," and the Court's analysis does not comport with accepted principles of

statutory construction. The MVSFA and the No Fault Act do not share a common purpose, and it was error for the Court of Appeals to effectively use the MVSFA to construe the No Fault Act. The unfortunate end result is that the Court of Appeals has created a huge loophole for individuals to contravene the purposes of the No Fault Act. Under the Court's analysis, an individual can purchase a motor vehicle with periodic payments, neglect to purchase insurance for the vehicle, and yet ensure his/her right to recover no fault benefits for injuries sustained while driving the vehicle. This can all be accomplished by either purchasing the vehicle from someone (such as a family member, friend, or someone selling through an ad) who is not in the retail sales business, or by not reducing the sale to writing. It is impossible to conceive why the No Fault definition of "owner" should be restricted in this fashion. Whatever definition is accepted should be consistent with the goals and policies behind the Act. Obviously, none of those purposes are advanced by exempting non-retail and non-written sales from coverage of the Act. The adoption of these exemptions by the Court of Appeals was therefore erroneous, and must be reversed.

(3) The decedent and his estate are barred from recovery of Michigan No-Fault benefits pursuant to MCLA 500.3113(b).

Survivor benefits are strictly derivative, in the sense that the right of the survivor to recover under the no-fault act is completely dependent upon the entitlement of the injured person had he or she lived. Belcher v. Aetna Cas. and Sur. Co., 409 Mich 231, 255, 293 NW2d 594, 609 (1980). MCLA § 500.3113(b) represents a policy decision by the Legislature to exclude the payment of the no-fault benefits in situations where the injury upon which the claim to benefits is based is suffered by a person whose uninsured vehicle is involved in the accident. Belcher v. Aetna Cas. and Sur. Co.,

409 Mich 231, 260-261, 293 NW2d 594, 609 (1980). Accordingly, both the Court of Appeals and this Court have held that survivors' loss benefits may not be recovered where the claim is based upon the accidental bodily injury resulting in death suffered by an owner or registrant of a vehicle for which the requisite security was not in effect at the time of the accident where the uninsured vehicle is involved in the accident. Belcher v Aetna Casualty, 409 Mich 231, 260-261, 293 NW2d 594 (1980); Desot v Auto Club, 174 Mich App 251, 435 NW2d 442 (1988).

Pursuant to MCLA 500.3113(b), Brady Sies is barred from recovery of Michigan PIP benefits for the accident in question because:

1. He was the owner of a motor vehicle.

2. That motor vehicle was involved in the accident.

3. The motor vehicle was uninsured.

As already discussed in Argument I(B)(1) and (2) above, Brady Sies would be barred from recovery of Michigan PIP benefits. Accordingly, given the derivative nature of survivors loss benefits, his dependents and estate are likewise barred from recovery.

ARGUMENT II

THE ESTATE IS BARRED FROM RECOVERY OF UNINSURED MOTORIST BENEFITS FROM MIC GENERAL BECAUSE THE DECEDENT WAS AN OWNER OF THE MOTOR VEHICLE THAT WAS INVOLVED IN THE ACCIDENT, AND THAT MOTOR VEHICLE WAS NOT LISTED IN THE MIC GENERAL POLICY.

(A) Standard of Review

Defendant/Appellant appeals from an order denying Defendant's Motion for Summary Disposition, and granting Plaintiff's Motion for Summary Disposition. An order granting or denying summary disposition must be reviewed de novo by the appellate courts. Steele v Michigan Dept. of Corrections, 215 Mich App 710, 712, 546 NW2d 725 (1996); Barr v Mt. Brighton, Inc., 215 Mich App 512, 515, 546 NW2d 273 (1996).

(B) Analysis

Uninsured motorists benefits are not statutorily required. Therefore, the language of the individual insurance policy dictates under what conditions uninsured motorist benefits will be provided, Rohlman v Hawkeye Security Insurance, 442 Mich 520, 525, 502 NW2d 310 (1993).

Two major divisions of most insurance policies are (1) the coverage or insuring agreement and (2) the exclusions. When construing an insurance contract, the Court must first determine whether the underlying claim falls within the policy's coverage agreement. Auto-Owners Insurance Co. v. Harrington, 455 Mich 377, 382, 565 NW2d 839 (1997); Group Insurance Co. of Michigan v Czopek, 440 Mich 590, 604, 443 NW2d 734 (1989); Allstate v Freeman, 432 Mich 656, 668, 443 NW2d 734 (1989). If the underlying claim falls within the terms of the coverage agreement, the Court must next determine whether the claim falls within a policy exclusion. Allstate, supra, 668.

A number of well established rules of construction assist the Court in the interpretation of insurance policies.

Under Michigan law, the insured and insurer may contract to whatever they wish, as long as the contract does not violate the law or public policy:

> Parties have the right to contract to the terms of an insurance policy and so long as the terms do not contravene statutory requirements of public policy, the courts will enforce an insurance contract as it would any other contract. Weisberg v. Detroit Automobile Inter-Insurance Exchange, 36 Mich App 513, 519, 194 NW2d 193 (1971).

Accordingly, an insurance policy must be construed according to contract principles. Smiley v Prudential Insurance Co., 321 Mich 60, 66, 32 NW2d 48 (1948); Hall v Equitable Life Assurance Society, 295 Mich 404, 408, 295 NW2d 204 (1940); Harmon v American Interinsurance, 39 Mich App 145, 149, 197 NW2d 307 (1972); FL Aerospace v Aetna Casualty & Surety Co., 897 F2d 214, 219 (1990). As such, insurers may limit the risks they choose to assume and fix premiums accordingly. Lehr v Professional Underwriters, 296 Mich 693, 696, 296 NW 843 (1941). The words of an insurance policy must be given their ordinary and plain meaning so as to avoid a technical or strained construction. Farm Bureau v Stark, 437 Mich 175, 181, 468 NW2d 498 (1991). Furthermore, it is not proper to rewrite an insurance policy under the guise of contractual construction. Edgars Warehouse v USF&G, 375 Mich 598, 602, 134 NW2d 746 (1965). A court can not create an ambiguity where none exists. Group Ins. Co. v. Czopek, 440 Mich. 590, 596, 443 NW2d 734 (1992). A policy is not ambiguous merely because it omits the definition of a term. Group Insurance Co. of Michigan v Czopek, 440 Mich 590, 596, 443 NW2d 734 (1989). A policy is ambiguous only if there is more than one reasonable interpretation of its language. Bianchi v Auto Club, 437 Mich 65, 70, 467 NW2d 17 (1991); Raska v. Farm Bureau Ins. Co., 412 Mich 355, 362,

314 NW2d 440 (1982). A contract is unambiguous if it fairly admits of but one reasonable interpretation, even if it is inartfully worded or clumsily arranged. Farm Bureau v Stark, 437 Mich 175, 184-185, 468 NW2d 498 (1991); Bianchi v Auto Club, 437 Mich 65, 70, 467 NW2d 17 (1991); Raska v. Farm Bureau Ins. Co., 412 Mich 355, 362, 314 NW2d 440 (1982). If the policy is unambiguous as written, the clear intent cannot be defeated merely because the language could have been made even clearer. Michigan law does not require that an insurance policy be a model of clarity. Bianchi v Auto Club, 437 Mich 65, 70, 467 NW2d 17 (1991).

These rules are equally applicable to exclusionary clauses. Clear and specific exclusions must be enforced, and an insurance company cannot be found liable for a risk it did not assume. Group Ins. Co. v. Czopek, supra, at 596-597.

For purposes of this appeal, the defendant MIC General has not contested that Brady Sies qualified as an insured for uninsured motorist benefits under its policy, but is asserting that the claim is excluded. The policy as issued to Brady Sies's grandfather, Elmer Sies, contained uninsured motorist coverage in Part C of the policy, pages 5-6. The exclusions are stated on page 5, and the first exclusion states:

> **"PART C - UNINSURED MOTORISTS COVERAGE**
>
> **EXCLUSIONS**
>
> A. We do not provide Uninsured Motorists Coverage for 'bodily injury' sustained:
>
> 1. By an 'insured" while 'occupying' or when struck by, any motor vehicle owned by that 'insured' which is not insured for this coverage under this policy. This includes a trailer of any type used with that vehicle."

This type of exclusion is commonly referred to as the "owned vehicle exclusion". Owner vehicle exclusions are valid so long as they are clear and unambiguous, employing easily understood terms and plain language, Bianchi v Auto Club of Michigan, 437 Mich 65, 70, 467 NW2d 17 (1991); Raska v Farm Bureau, 412 Mich 355, 362, 314 NW2d 140 (1982); and ACIA v Page, 162 Mich App 664, 668, 413 NW2d 472 (1987). In both Bianchi and Page, the court upheld the validity and application of an owned vehicle exclusion in a claim for uninsured motorist benefits.

The owned vehicle exclusion - which is common in uninsured motorist policies - focuses on multiple vehicles in the named insured's household. When the named insured, or a resident relative is using a family-owned vehicle and becomes involved in an accident with an uninsured motor vehicle, uninsured motorist benefits are recoverable only if that specific family-owned vehicle had uninsured motorist coverage on the policy against which the claim is made. This exclusion prevents people from buying uninsured motorist coverage on only one of several household vehicles, and then claiming benefits for accidents involving other household vehicles which do not have uninsured motorist coverage. This exclusion also prevents people from stacking coverages by recovering against uninsured motorist coverages on multiple policies in the same household.

As far as the exclusion is concerned, there is no dispute that Brady Sies sustained bodily injury while occupying a motor vehicle which is not listed on the MIC General policy. Therefore, the only question as to the exclusion is whether or not Brady Sies "owned" the motor vehicle (involved in the accident) within the context of the insurance policy, as opposed to the No-Fault Statute.

It is the contention of MIC General that Brady Sies "owned" the 1988 pick-up truck at the time of the accident using either a statutory definition or a common meaning definition.

Arguments I (B)(1) and (2) above would apply in interpreting "owner"as used in the MIC General Uninsured Motorists Coverage. If this Court agrees that Brady Sies qualifies as an owner either because he had the right to exclusive use of the pick-up truck involved in the accident for a period exceeding 30 days, or because he purchased the pick-up truck pursuant to an installment sales contract and had immediate right of possession, then this Court must likewise determine that Brady Sies was an owner for purposes of insurance policy interpretation.

Quite apart from this, however, the courts normally interpret the terms or words of an insurance contract in accordance with their "commonly used meaning", Group Insurance v Czopek, 440 Mich 590, 596, 489 NW2d 748 (1992); Arco Industries v American Motorists, 448 Mich 395, 403, 572 NW2d 617 (1995). That is, terms in a policy are to be given their plain, ordinary and popular sense, Clevenger v Allstate, 443 Mich 646, 505 NW2d 553 (1993). Neither "owned" or "owner" is defined in the MIC General policy. The mere fact that an insurance policy term or word, which is in controversy is not defined in the policy does not create an ambiguity, Vanguard Insurance v Racine, 224 Mich App 229, 568 NW2d 156 (1997).

The simplest way for the courts to determine the "commonly used meaning" is to seek the definitions within a dictionary, which the Court did in Bianchi v Auto Club, 437 Mich 65, 467 NW2d 17 (1991), Wielinga v American Way Insurance, 189 Mich App 359, 363, 473 NW2d 730 (1991), and Mueller v Frankenmuth Insurance, 184 Mich App 669, 459 NW2d 95 (1990), among others. In these cases the Court sought dictionary definitions to determine common meaning. In Bianchi, the court determined a definition of "motorcycle" by reference to the dictionary, 437 Mich at 71, footnote 2. In Wielinga, the Court sought the definition of "work" as used in a credit disability insurance policy. In Mueller, the Court sought the definition of "explode".

Therefore, it only makes sense to seek out a dictionary definition for the words "own" or "owner". According to the *Merriam Webster's Collegiate Dictionary, Tenth Edition* (1997), "own" when used as a transitive verb is defined as "... 1 a : to have or hold as property : POSSESS b : to have power over : CONTROL." Therefore, the most common definition of own is to possess or control. In this case, Matthew Roach "sold" the pick-up truck to Brady Sies who took both possession and control of it. He continued that possession and control from the date of purchase through the date of the accident. Within the common usage of the word "own", Brady Sies owned the pick-up truck that he was driving at the time of the accident.

Therefore, the exclusion applies in the case at bar because:

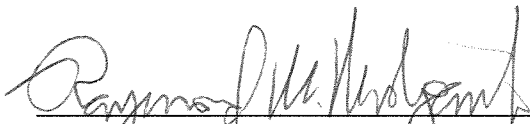
1. The decedent was occupying the pick-up truck (i.e., driving) at the time of the accident.
2. The decedent owned the pick-up truck involved in the accident.
3. The pick-up truck was not insured for UM coverage (or any other coverage) on the MIC General policy.

Under the circumstances, the estate of Brady Sies is not entitled to UM benefits, and the lower court clearly erred by granting the estate's Motion for Summary Disposition. Accordingly, the affirmance of this summary disposition by the Court of Appeals was erroneous.

RELIEF REQUESTED

The Defendant/Appellant MIC General Insurance Corporation prays that this Court grant it leave to appeal from the order of summary disposition in favor of the Plaintiff/Appellee and denying Defendant's motion for summary disposition, and the May 31, 2002 opinion of the Court of Appeals affirming the order of summary disposition; in the alternative, Defendant/Appellant prays that this Court enter a peremptory order reversing the order of summary disposition in favor of the Plaintiff/Appellee, and remanding this matter to the trial court for entry of an order granting Defendant's Counter Motion for Summary Disposition as to the claims for Michigan PIP benefits and uninsured motorist benefits.

SIEMION, HUCKABAY, BODARY,
PADILLA, MORGANTI & BOWERMAN, P.C.



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Dated: June 21, 2002